



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[FMCSA-2014-0034]

**Hours of Service of Drivers: Payne and Dolan, Inc.; Zenith Tech, Inc.; and
Northeast Asphalt, Inc.; Application for Exemption**

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from Payne and Dolan, Inc.; Zenith Tech, Inc.; and Northeast Asphalt, Inc. for an exemption from the 30-minute rest break provision of the Agency's hours-of-service (HOS) regulations for commercial motor vehicle (CMV) drivers. The requested exemption would apply to CMV drivers of these three companies involved in the transport, placement and movement of materials and equipment needed in the day-to-day operation of road, bridge and parking lot construction and maintenance. These companies believe that compliance with the 30-minute rest break rule is extremely difficult due to several variables associated with the nature of their operations and work scheduling (e.g., work zone time, delivery and repair schedules). FMCSA requests public comment on these companies application for exemption.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA-2014-0034 by any of the following methods:

- Federal eRulemaking Portal: www.regulations.gov. Follow the online instructions for submitting comments.
- Fax: 1-202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number.

For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to www.regulations.gov, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov, and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the “help” section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Bus and Truck Standards and Operations; Telephone: 202-366-4325. E-mail: MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation

(49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Request for Exemption

On December 27, 2011 (76 FR 81133), FMCSA published a final rule amending its hours-of-service (HOS) regulations for property-carrying CMV drivers. The final rule adopted several changes to the HOS rules, including a new provision requiring drivers to take a rest break during the work day under certain circumstances. Drivers may now drive a CMV only if 8 hours or less have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes. FMCSA did not specify when drivers must take the 30-minute break, but the rule requires that they wait no longer than 8 hours after the last off-duty or sleeper-berth period of that length or longer to take the break. Drivers who already take shorter breaks during the work day could comply with the rule by taking one of the shorter breaks and extending it to 30 minutes. This requirement took effect on July 1, 2013.

Payne and Dolan, Inc. Zenith Tech, Inc., and Northeast Asphalt, Inc. seek an exemption from the 30-minute rest break provision in 49 CFR 395.3(a)(3)(ii), which would apply to these companies and their CMV drivers operating pavement repair and maintenance trucks. These companies currently operate roughly 1,000 trucks, driven by approximately 1,300 drivers in interstate commerce. According to these companies,

compliance with the new 30-minute break rule is problematic, burdensome, and adversely impacts the effectiveness of the companies' delivery of material and equipment. Approximately 95 percent of their drivers spend less than 15 percent of their on-duty time actually driving a CMV – roughly only 2 hours per day – with the other 85 percent of the time spent on the job site performing their associated duties. Drivers pick up their equipment at a designated storage site and deliver it to the work site and unload on a daily basis, and the next time they are required to operate the CMV is to load and return the equipment to the storage yard at the end of the duty shift. Most Federal, State and municipal jobs give the contractor a finite amount of time to have the roads closed and perform the needed repairs – usually from 9:00 p.m. to 5:00 a.m. According to these three companies, with the requirement for these drivers to take the mandatory 30-minute break, the work zone time is shortened by one half hour, thus extending the length of time required to complete the scheduled repairs. They agree that they need the flexibility to deliver equipment and materials when the job and circumstances dictate the need, as these road repairs can't always be scheduled for 9:00 a.m. to 5:00 p.m. They further add that drivers in their industry segment are not subject to the fatigue-inducing work conditions that other CMV operators are.

Payne and Dolan, Inc. Zenith Tech, Inc. and Northeast Asphalt, Inc. state that materials delivered to an active job site have a short life span – the temperature of asphalt needs to be maintained – and should be considered a perishable product. Once the ingredients of the material have been mixed (or batched) there is a short “window” before the temperature drops to a point that it is no longer usable. An incident such as this costs thousands of dollars to rectify and could potentially cause a violation of a delivery

contract. Once a delivery is started it must be completed, and all steps possible must be taken to ensure that a load of material reaches its destination on time and without disruption. An uninterrupted delivery is also necessary in case a driver is made to wait a long period of time on a construction site before unloading – a common “real world” scenario according to the applicants for exemption. Adding a mandatory 30-minute break to this process risks the integrity of the industry’s delivered product.

These companies believe the requested exemption would achieve the same level of safety as the 30-minute rest break because their drivers routinely receive numerous 10-, 15-, and 20-minute breaks throughout the work day, and it is not uncommon for their drivers to take breaks of up to 2 hours resulting from weather or unforeseen construction delays. They further claim that these frequent breaks work to keep the drivers awake and alert throughout the course of their duty period. One additional 30-minute break – as is now required by the FMCSRs – would not add an additional level of safety for their operation. The applicants state that the construction industry ensures drivers are as safe as possible and continue to use practices that emphasize safety. This attention to safety is achieved through mandating rigorous training for all truck drivers, daily, weekly, quarterly and annual safety checks, and self-imposed random safety audits. A copy of their exemption application is available for review in the docket for this notice.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b)(4), FMCSA requests public comment on this application for an exemption from one provision of the driver’s HOS regulations in 49 CFR part 395. The Agency will consider all comments received by close of business on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE

FEDERAL REGISTER]. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will consider to the extent practicable comments received in the public docket after the closing date of the comment period.

Issued on: July 29, 2014.

Larry W. Minor,
Associate Administrator for Policy.

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